STATE OF MICHIGAN

IN THE SUPREME COURT

In re: ESTATE OF IDA E. SPRENKLE-HILL

GEORGE H. HILL, Petitioner Appellee
v

LESLIE R. FLINT, Respondent-Appellant

and

DAVID H. TRIPP, Personal Representative,
Respondent

Supreme Court Number:_____

Court of Appeals Docket No: 248783 Opn 2/22/05

Trial Court Number: 2002-023531-DA

Barry
R. Shaw

28364 Robert L. Byington, P-27621
Attorney for Respondent/Appellant
222 West Apple Street
APL P.O. Box 248
Hastings, Michigan 49058
5/3 Ph: (269) 945-9557

Robert J. Longstreet (P53546)
27389 Attorney for Petitioner/ Appellee
607 North Broadway
Hastings, Michigan 49058
Ph: (269) 945-3495

David H. Tripp (P29290)
Attorney for and Personal Representative
206 South Broadway
Hastings, Michigan 49058
Ph: (269) 945-9585

APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED FROM

Appellant seeks leave to appeal from the Opinion of the Michigan Court of Appeals dated February 22, 2005, a copy of which is attached as Exhibit 1, (Opinion of the Michigan court of Appeals dated February 22, 2005).

Appellant is requesting the court to grant leave to appeal and on appeal, to reverse the opinion of the Michigan Court of Appeals and affirm the Barry County Probate Court. Appellee presumably will request that the court deny the application for leave to appeal.

STATEMENT OF QUESTIONS FOR REVIEW

BY PETITIONER/ APPELLANT

I Where the Decedent's will and estate planning documents are signed by the Decedent prior to the marriage to a spouse who survived the decedent, and the estate planning documents direct that nearly all the estate should be distributed to the children of the Decedent, may the surviving spouse elect against the will of the Decedent and receive one-half of the intestate share of the estate contrary to the stated intent of the Decedent?

Barry County Probate court answered, "No"

Respondent/Appellant answers, "No"

Petitioner/Appellee presumably Answers, "Yes"

The Court of Appeals answered, "Yes"

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Decedent passed away October 29, 2001 a resident of Barry County, Michigan. She left a will dated July 12, 1999. The Decedent also left a trust of even date. After signing the will and trust, and about six months prior to her death, the Decedent married George Hill, a resident of Nebraska. Neither the will nor the trust were amended after the marriage. Both the Decedent and Mr. Hill had families by their prior spouses, but none together. Thus, none of the Decedent's children and descendants were children of the surviving spouse. The will was admitted to probate December 10, 2002, without objection from any interested party. The terms of the will pour the assets of the estate over to the Ida Sprenkle Family Trust dated July 12, 1999. The trust in turn distributes the estate as follows: $5,000 to Phillip Ryne; $4,000 to Todd C. Lurker; (neither of whom were children of the Decedent) and the balance of the estate to John J. Flint and Leslie R. Flint, sons of the deceased. At the time of death of the Decedent, both sons survived, although one of her children, John J. Flint has since died.

The Decedent's spouse, George Hill, filed a spouse's election indicating that he would take half of the share that would have passed to him had the testator died intestate, reduced by half of the value of all property derived from the Decedent by any means other than testate or intestate succession under MCL 700.2202.

The Barry County Probate Court, Judge Richard H. Shaw, determined that the surviving spouse, George Hill, was not entitled to the elective share under MCL 700.2202 because of the limiting language of the pretermitted spouse provision under MCL 700.2301 and the recent case of In re Bennett Estate, 255 Mich.App 545, 662 NW2d 772 (2003). (See Attached Exhibit 2) The surviving spouse timely appealed to the Michigan Court of Appeals. The Court of Appeals

affirmed the Barry County Probate Court decision in its decision dated October 26, 2004. (See attached Exhibit 3) An Application for Leave to Appeal that decision was timely filed by the Petitioner Appellee. On February 22, 2005, the Court of Appeals, on its own motion, vacated its October 26, 2004 decision and rendered a new opinion and order reversing the October 26, 2004 decision. (See attached Exhibit 4) Subsequent to this reversal, the prior Application for Leave to Appeal the October 26, 2004 decision was withdrawn. (See attached Exhibit 5) As noted, copies of the relevant opinions and orders are attached to this brief for reference.

It is from the Michigan Court of Appeals decision of February 22, 2005 (Exhibit 1) that this Application for Leave to Appeal applies.

ARGUMENT

I. In order to be granted leave to appeal, the Appellant must state the grounds upon which the application is based.

The question at this stage in the proceedings is whether the Michigan Supreme Court should grant the Appellant's request for appeal or not. The resolution of this question is covered under MCR 7.302(B). This rule makes it clear that the application must show the grounds for granting the application. It is the Appellant's position that the issue as presented and resolved by the Michigan Court of Appeals presents a question of major significance to the state's jurisprudence. It involves the significant question of the rights of the surviving spouse in a testate estate versus the rights of the children as beneficiaries of the will and trust executed prior the marriage and expressing the intent of the testator. It is also the Appellant's position that the question presented, and the resolution of this issue by the Court of Appeals, is in conflict with a prior Court of Appeals decision in the case of In re Bennett Estate, 255 Mich.App 545; 662 NW2d 772 (2003).

II. The proper standard of review, should leave be granted in this case, is a review de novo of the interpretation and application of the statute.

At issue in this case is the proper interpretation of MCL 700.2301 and its interplay with MCL 700.2202. The proper interpretation of a statutory provision is a question of law that the Court reviews de novo.

This standard of review stated in the Court of Appeals decision in this matter as a review de novo. Haworth, Inc. v Wicks Mfg Co, 210 Mich App 222, 532 NW2d 903 (1995), Neal v Wilkes 470 Mich. 661, 685 N.W.2d 648 (2004). [E]rror may be committed by basing a finding of fact on a misconception of law and by failing to correctly apply the law to the finding of fact." Price v. Westland, 451 Mich. 329, 547 N.W.2d 24 (1996). In addition, error may be committed

when an erroneous legal standard or framework is employed or a decision is based on erroneous legal reasoning. In such cases, de novo review is appropriate. Hoste v Shanty Creek Management, Inc, 459 Mich. 561, 592 N.W.2d 360 (1999).

III. A pretermitted spouse's right to an inheritance from the deceased spouse's estate is limited by MCL 700.2301.

Where, as here, a testator's spouse married the testator after the testator executed his or her will, the statutory scheme limits the assets available to satisfy the intestate share of the surviving spouse to that part of the estate not devised to the natural children of the deceased spouse. In re Bennett Estate, 255 Mich.App 545; 662 NW2d 772 (2003).

The wording of MCL 700.2301 is quite clear. It says, in part,:

> (1) Except as provided in subsection (2), if a testator's surviving spouse marries the testator after the testator executes his or her will, the surviving spouse is entitled to receive, as an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that is not any of the following:
>
> (a) Property devised to a child of the testator who was born before the testator married the surviving spouse and who is not the surviving spouse's child.
>
> (b) Property devised to a descendant of a child described in subdivision (a)." MCL 700.2301

This section is based upon the Uniform Probate Code (UPC) section 2-301 which reads, in part,

> "If a testator's surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 or 2-604 to such a child or to a descendant of such a child..." UPC 2-301.

There is surprisingly little law that this writer was able to discover from other states that

have adopted the Uniform Probate Code interpreting this section. The comments to this section under the Uniform Probate Code are, however helpful. These comments to the 1993 revisions of the Uniform Probate Code define the scope and purpose of this section as follows:

> "**Purpose and Scope of the Revisions.** This section applies only to a premarital will, a will executed prior to the testator's marriage to his or her surviving spouse. If the decedent and the surviving spouse were married to each other more than once, a premarital will is a will executed by the decedent at any time when they were not married to each other but not a will executed during a prior marriage. This section reflects the view that the intestate share of the spouse in that portion of the testator's estate not devised to certain of the testator's children, under trust or not, (or that is not devised to their descendants, under trust or not, or does not pass to their descendants under the antilapse statute) is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation.
>
> Under this section, a surviving spouse who married the testator after the testator executed his or her will may be entitled to a certain minimum amount of the testator's estate. The surviving spouse's entitlement under this section, if any, is granted automatically; it need not be elected. If the surviving spouse exercises his or her right to take an elective share, amounts provided under this section count toward making up the elective-share amount by virtue of the language in subsection (a) stating that the amount provided by this section is treated as "an intestate share." Under Section 2-209(a)(1), amounts passing to the surviving spouse by intestate succession count first toward making up the spouse's elective-share amount. UPC 2-301.

Some of the key language in this commentary to the Uniform Probate Code is important to the interpretation of this section. Especially the language the expresses the intent as expressing the view that the intestate share of the pretermitted spouse is what the testator would want the surviving spouse to have if the deceased spouse had thought about it. This analysis makes sense in the situation when, as here, a person marries later in life, after the children are grown and out of the home. It is logical for the decedent to desire to preserve the estate for their respective children rather than for the surviving spouse. The later in life the marriage occurs, the greater the possibility that the survivor will also have amassed their own estate and are capable of providing for themselves without the contribution from the deceased spouse's estate.

Recognize, then, that in a short-term, late-in-life marriage which produces no children, a

decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a perceived higher obligation to the children of his or her former, long-term marriage. The Multiple-marriage Society and Spousal Rights under the Revised Uniform Probate Code, 76 Iowa L. Rev. 223, (1991). As a side comment regarding this law review article, it is interesting to note that the article was written in 1991 yet the revision to the Uniform Probate Code did not occur until 1993. In the 1993 revisions, the elective share provision was substantially revised to reflect the "partnership" view of the marriage. the revision to the Uniform Probate Code adopted a scheme of graduating the surviving spouse's share of the estate based upon the length of the marriage. The Michigan Legislature did not adopt this version of the Uniform Probate Code but rather an earlier version which did not use the graduated or partnership approach.

This is precisely the situation in the current case. It is also precisely the question answered by MCL 700.2301. The children of the prior marriage are protected under this section by the statute defining the intestate share of the estate as that portion which passes to other than the children of the decedent. To interpret this section otherwise would deprive the children from the inheritance.

Had the decedent desired to provide for her spouse in her will, she could have written a new will or a codicil. She did neither. The wishes of the decedent should be respected and adhered to. The survivor should not become the beneficiary of a windfall.

The Court of Appeals ruled that there was no ambiguity in the statutory language of Sections 2202 and 2301. While the two sections, if read in isolation, appear clear, when read together, the result is somewhat different. MCL 700.2202 allows any surviving spouse to elect against the terms of the will and take as their portion of the estate one-half of the amount the spouse would have receive had the decedent died intestate. MCL 700.2301 then defines the

intestate share of a pretermitted spouse when it says that "the surviving spouse is entitled to receive, as an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that is not any of the following:..." MCL 700.2301(1). The section then goes on to limit the amount of the "intestate share" of the pretermitted spouse to that share devised to other than the Decedent's children.

The Court of Appeals, in its October 26, 2004 decision interpreted MCL 700.2301 when it said that "Spouses who were present but left out of a testator's will when the will was drafted are situated differently from spouses who acquired that status only after the will had been executed." The Court of Appeals also said, correctly, that the statutory scheme limits the assets available for the pertermitted spouse. This interpretation by the Court of Appeals in their October 26, 2004 decision is consistent with the argument above and is supported by their analysis that the more specific of the two provisions dealing with spouses should control. If the case were otherwise, then there is no reasons to include MCL 700.2301 in the statute at all, as is becomes simply redundant to the elective share provisions under MCL 700.2202.

The case of In re Bennett Estate, 255 Mich.App 545; 662 NW2d 772 (2003) says that

> "In the context of these facts, EPIC limits the assets available to satisfy the intestate share of the surviving spouse, Blanche, to that part of the estate not devised to the natural children and it abates the devise to the stepchildren, who do not meet the statutory definition of "child." In other words, the statute provides that a surviving spouse in Blanche's position, i.e., one who married the testator after he executed his will, is entitled to an intestate share of her spouse's estate."

It is the Appellant's position that the decision rendered by the Court of Appeals in this case on February 22, 2005 when it said, in effect, that the intestate share available to satisfy the intestate share is not limited to that part of the estate not devised to the natural children. While both decisions indicate that the surviving spouse is entitled to an intestate share the difficulty is

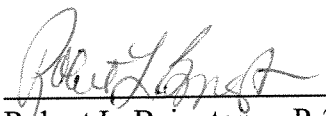
the definition of the intestate share. In Re Bennett Estate, indicates that the intestate share of a pretermitted spouse is limited by MCL 700.2301. The February 22, 2005 decision of the Court of Appeals says that it is not limited in any way. Thus, the two cases are in conflict and should be resolved by this court granting this Application for Leave to Appeal.

RELIEF REQUESTED

The Appellant requests that this court grant the Appellant's request fo leave to appeal.

Dated: April 4, 2005

Respectfully submitted,



Robert L. Byington P-27621
Attorney for Respondent/Appellant
Depot Law Office
222 West Apple Street
P.O. Box 248
Hastings, Michigan 49058